United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

C I T A T I O N S

Cases:

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-1284

UNITED STATES OF AMERICA,
Appellee

v.

JOSEPH BONACORSA,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

ISSUES PRESENTED

1. Whether the evidence is sufficient to sustain appellant's convictions.

2. Whether there was a variance between Count Three of the indictment and the proof adduced at trial.

3. Whether the testimony of one defense witness was excluded from evidence and whether the trial court's instructions withdrew from the jury's consideration specified portions of the testimony of another defense witness.

4. Whether the trial court's questioning of defense witnesses was improper.

5. Whether the trial court's responses to inquiries made by the jury during the course of its deliberations were

proper and sufficient.

6. Whether certain of government counsel's remarks and questions were improper.

7. Whether the trial court properly denied appellant's post-trial motion to vacate the judgments of conviction and dismiss the indictment.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York (Platt, J.), appellant Bonacorsa was convicted of perjury, in violation of 18 U.S.C. 1623 (count 1), and obstruction of justice, in violation of 18 U.S.C. 1503 (count 3). He was acquitted on another count which had also alleged an obstruction of justice in violation of 18 U.S.C. 1503 (count 2). Appellant was sentenced to concurrent terms of two years' imprisonment, with all but four months suspended and appellant placed on probation for three years. He was also fined $1,000 on each count.

A. The Grand Jury Investigation.

In April of 1972, a special grand jury commenced an investigation of possible violations of 18 U.S.C. 224 (sports bribery) in the New York harness racing industry. As part of its investigation the grand jury examined the question of hidden ownership and sought to determine whether the registered owners of certain horses were the actual owners (Tr. 18-31, 159-161).[1/]

Following the investigation, Forrest Gerry and numerous others were indicted for having influenced the outcome of harness races by bribery and having conspired to do so, in violation of 18 U.S.C. 224. Gerry was convicted (Tr. 20, 22, 161).

1/ "Tr." refers to the transcript of trial proceedings (November 14 and November 18 through 21, 1975). The judgment of conviction was entered on July 3, 1975 (App. 291). "App." refers to appellant's appendix. "H." refers to the transcript of the post-trial hearing.

See United States v. Gerry, 515 F.2d 130 (2nd Cir. 1975).[2] Forrest Gerry was considered an expert in the harness racing industry, but was not permitted to race any horses owned by him (Tr. 27-28, 44, 47).[3]

1. Appellant's appearance before the Special Grand Jury on June 11, 1973 (Gov. Ex. 1).

During the course of its investigation the grand jury questioned most of the harness drivers who operated at Roosevelt and Yonkers Raceways, including appellant Bonacorsa (Tr. 25; App. 16). Appellant received a subpoena in May. On June 11, he appeared before the grand jury. His counsel was available outside the grand jury room (H. 5-6, 41, 49). Appellant testified that he had recently purchased some horses with money he had borrowed from one Matthew Lentsch. The agreement was that if the money was not repaid within six months, Lentsch would receive the horse (Gov. Ex. 1; App. 16). Appellant had obtained

2/ It was also shown at trial that the grand jury indicted Gerry for obstruction of justice (Tr. 20). See United States v. Turcotte, 515 F.2d 145 (2nd Cir. 1975).

3/ Gerry had at one time been licensed to race horses (Tr. 49). This record does not disclose why his license was revoked. One must be licensed by the U. S. Trotting Association in order to drive or race a horse (Tr. 47).

the money "to get back in the ball game to try to make some money because [he] had been in debt to feedmen and everybody at the racetrack" (App. 17).[4] He stated that all the horses were registered in his name and denied having any secret partners (App. 16).[5] He stated that he knew Forrest Gerry only casually and had never seen him except at the racetrack (App. 17-19, 22). He testified further that he had once spoken on the telephone with Gerry and had asked him whether any "good claims" were available (App. 21-22).[6] Finally, appellant testified that he had on no occasion discussed race fixing with any drivers (App. 21).

2. Appellant's appearance Before the Grand Jury on September 14, 1973 (Gov. Ex. 2).

Appellant again appeared before the grand jury on September 14, 1973 (Gov. Ex. 2; App. 23-39). Prior to this

4/ The original transcription was corrected by stipulation (Tr. 13).

5/ He also stated that he personally paid for all bills in connection with the horses (App. 20).

6/ In a claiming race, a price is set on the horse by the owner prior to the race and anyone can then purchase or claim the horse for that price

appearance, appellant and several other drivers also present pursuant to subpoena were advised by the special attorney, Mr. Myerson, that all were potential targets of the grand jury's investigation (H. 6-7, 9, 19-21, 38). According to Mr. Myerson, appellant and the others were also given Miranda warnings prior to their appearances (H. 6-7, 18-20, 38, 41-42). This was disputed by appellant's attorney who was present with him at the time (H. 43, 46).[7/]

In his testimony before the grand jury on September 14, appellant stated that he had received telephone calls from Forrest Gerry on at least six occasions and that all these conversations related to buying and selling horses (App. 25). After it had been pointed out to him that he had stated during his June 11th appearance that he had had only one telephone conversation with Gerry, appellant responded that all of the telephone calls had occurred after June 11 (App. 25-26). Appellant also stated, contrary to his June 11th testimony, that at some time between January and April of that year he had met with Gerry at the latter's motel room. Gerry had inquired whether appellant was interested in purchasing some horses he owned. Appellant explained

7/ Appellant, however, when his deposition was taken on December 17 and when he appeared before the grand jury on December 19 (infra at pp. 8-10) stated that he had been advised of his "right to remain silent" and his right to an attorney on September 14 (App. 42-43, 46, 57).

that he had not recalled this meeting when he appeared before the grand jury previously (App. 30-31).

Appellant also gave the following testimony, which was alleged in count 1 of the indictment to have been a willfully false response to material matters (App. 10):

> Q. Are any horses which you now own or train or have driven really owned by Forrest Gerry?
>
> A. No, sir. [App. 27]
>
> * * * * *
>
> Q. Did you ever purchase race horses for Forrest Gerry under your name or your wife's name?
>
> A. No.
>
> Q. Or anyone else's name?
>
> A. No.
>
> Q. Do you know if Forrest Gerry ever purchased horses under anyone else's ownership?
>
> A. No, I don't. [App. 33]

During the course of his testimony, appellant acknowledged that in March 1973, he had purchased $43,000 worth of horses, which he had registered in his wife's name (App. 33). He reiterated his earlier testimony that the money used for these purchases was from a loan he received from Matthew Lentsch. He stated that Lentsch had the option of obtaining the horses after six months if the money was not repaid, and that he had already given Lentsch two of the horses, valued at $26,750. He also testified that

the loan was secured by his house, although there was no written agreement to this effect (App. 33-35).[8/]

3. Appellant's appearance before the Special Grand Jury on December 19, 1973 (Gov. Exs. 4 and 5).

On December 17, 1973, appellant gave a deposition in the presence of his attorney, Mr. Polina, Special Attorney Mr. Meyerson, and an agent of the F.B.I. Mr. Meyerson had previously had several conversations with Mr. Polina, indicating that the government had serious doubts concerning the veracity of appellant's previous grand jury testimony and suggesting that Mr. Polina encourage appellant to cooperate fully with the grand jury's investigation. Accordingly, appellant was scheduled to appear before the grand jury on December 17. Due to the absence of a grand jury quorum because of inclement weather, appellant's deposition was taken instead, with the understanding that it would subsequently be read to the grand jury (A. 41-42). Appellant did appear before the grand jury on December 19 and at that time adopted the deposition as an accurate statement (App. 56-59).[9/]

8/ Appellant was also asked several questions designed to elicit any knowledge he might have regarding race fixing (App. 27, 36-38).

9/ Prior to the taking of his deposition and at the outset of his appearance before the grand jury, appellant was advised of his "right to remain silent" (App. 42, 57). On both occasions, appellant stated his willingness to testify (App. 42-43, 57).

In the deposition, appellant stated that he had purchased five horses with approximately $46,000 that he had borrowed from Martin Lentsch, and that Mr. Lentsch's son, Matthew Lentsch, had delivered the money to him in cash on various dates in February and April 1973 (App. 43-46). He purchased four of the horses in claiming races (App. 45).[10/] He stated further that he purchased the fifth horse, Joli Timmy, directly from the horse's trainer, Steve Rubin. He dealt with Mr. Rubin only once, when he purchased the horse for cash and received from him the bill of sale (App. 46-47).[11/] The testimony regarding purchase of the horse Joli Timmy and the following testimony was alleged in count 1 of the indictment to relate to material matters and to have been willfully false (A. 11-13):

> Q. I would like to go over now your testimony concerning Forrest Gerry.
>
> A. Okay. [App. 47]

* * * * *

10/ He also stated that either he and Matthew Lentsch or Matthew Lentsch alone would exchange the cash for certified checks with which to claim the horses (App. 45, 51-52).

11/ Appellant also testified that he no longer owned any of the five horses, that four had been given to Mr. Lentsch in return for the money he borrowed and that the other horse (Timber) had been reclaimed for $10,000 by the individuals from whom he had claimed the horse. According to appellant, Lentsch had told him that he could retain the $10,000 in order to claim another horse "so that [he] could keep going" [App. 52-53].

Q. And did you ever have any business deals with him at all?

A. No. No.

Q. No business dealings with him?

A. No. Not that I can remember at any time. The only business dealing I ever had with Forrest Gerry was when I first met him, many years ago. It must have been fifteen years or better. A young boy come to the track was looking for a goat and I sold him a goat for $10 . [App. 48]

Q. You never bought or sold horses from him?

A. No, I didn't.

Q. And he was never your agent in buying or selling any horses?

A. No. [App. 49-50]

B. The Evidence at trial.

1. The government's evidence.

Appellant's testimony before the grand jury on June 11, September 14 and December 19, was received in evidence, and the materiality of the testimony to the grand jury's investigation was conceded (Tr. 17, 31). Registration papers on the horse Joli Timmy, maintained by the U. S. Trotting Association (U.S. T. A.), showed that the horse had been sold by Leonard Schweitzer on February 23, 1973. The purchaser was shown as Mary Bonacorsa, appellant's wife (Gov. Ex. 7; Tr. 46).[12/] All

12/ The filing of false registration information is grounds for suspension or expulsion from the U. S. T. A. and one suspended or expelled from that organization cannot race or drive horses (Tr. 44-45, 47).

preceeding sales of this horse were also shown (Gov. Exs. 6, 8; Tr. 35-43, 46-47). The U. S. T. A. registrar also testified on cross-examination that the registration papers reflected an ownership transfer from M. Bonacorsa to Matthew Lentsch on September 22, 1973. 13/

Steven Rubin, a trainer of harness racing horses for Leonard and Richard Schweitzer, testified that the Schweitzers had purchased the horse Joli Timmy for $12,500 in a claiming race in 1972 (Tr. 57-59). He had trained the horse in return for his salary and slightly more than 5% of any profits derived from the horse, though he did not own the horse in the sense that he bore any financial liability for him (Tr. 59-60, 158-159). After the horse developed a sore leg, Rubin advised the Schweitzers to sell the horse, and Richard Schweitzer authorized Rubin to sell Joli Timmy (Tr. 61).

Rubin negotiated a sale with Forrest Gerry, who represented that he was acting on behalf of an interest in New Zealand, but this deal was not realized and Gerry purchased the horse himself for $3,500 (Tr. 61, 64, 177, 191). Gerry made an initial payment of $1,000 in cash to Richard Schweitzer (Tr. 62, 238). Thereafter, in February 1973, Rubin met Gerry at the parking lot at Yonkers Raceway and Gerry took $2,500 from the trunk of his car and gave

13/ Considerable dispute subsequently developed as to which of the ownership transfers were shown by these exhibits (infra at p. 22).

it to Rubin, who observed a large amount of remaining cash in the trunk (Tr. 62, 65-66, 121-122).[14] Rubin gave the $2,500 to Richard Schweitzer (Tr. 62).

At Gerry's direction Rubin left the registration papers blank and delivered the horse and the papers to appellant Bonacorsa the following day (Tr. 123-128, 133-135, 218).[15] Appellant assured Rubin that he would deliver the papers to Gerry (Tr. 125-128). Rubin testified further that appellant Bonacorsa had not been involved in the sale negotiations, had never been represented as the owner and had given him no money for the horse; nor had appellant in any way indicated that the horse was his at the time Rubin delivered the horse and blank registration to him at Gerry's direction (Tr. 61-62, 133-134).

Richard Schweitzer corroborated Rubin's testimony as to the details of the agreement (Tr. 257-258, 260-262, 273, 277-281). Rubin had negotiated the sale with Gerry on his behalf, though Gerry made an initial payment of $1,000 in cash to Schweitzer (Tr, 255-258, 260-262, 266-267). Rubin gave him the $2,500 in cash that he received from Gerry (Tr. 284). Appellant Bonacorsa

14/ As another aspect of the bargain, the Schweitzers received an option to purchase from Gerry another horse. They did receive the horse but returned it after a few days (Tr. 63-64, 192).

15/ Initially, Rubin was to deliver the horse and papers directly to Gerry, who subsequently arranged for the delivery to be made to appellant (Tr. 134-135).

was never represented to him as the purchaser of the horse (Tr. 259).

After the sale, Joli Timmy did race, and Mary Bonacorsa was listed as his owner (Tr. 275-276, 283).

After the sale, the grand jury commenced its investigation into race fixing in the harness racing industry. The investigation was common knowledge in the industry (Tr. 146-147, 159-161, 174-175). In September 1973, shortly before Forrest Gerry was indicted, Gerry's girlfriend, Connie Rogers, telephoned Rubin and, acting on instructions presumably conveyed by Gerry, Rubin met with appellant Bonacorsa and gave him a back-dated bill of sale in Mary Bonacorsa's name (Tr. 135-139, 180, 182, 239-240, 243).[16] Appellant at this time told Rubin that if anyone were to investigate the matter and question him about the horse, he should tell them that he (Bonacorsa) had purchased it, that "it would be better for the both of [them]...if [Rubin] said Bonacorsa bought the horse" (Tr. 138-138a, 140, 244, 249-251). A few weeks later,

16/ The bill of sale was drawn by Rubin in Bonacorsa's presence, and Bonacorsa told him to use Mrs. Bonacorsa's name (Tr. 138a-139).

The bill of sale reflected a purchase price of $4,000. Rubin explained that the individuals from whom the Schweitzer's had purchased the horse for $12,500 had offered him $3,500 for it and that he had wanted them to believe he was able to get a better price (Gov. Ex. 6; Tr. 140-141, 213, 216).

Rubin saw Bonacorsa at the race track and asked whether he had heard anything about Gerry. Rubin told him that thus far no one had questioned him about the horse. Appellant Bonacorsa responded that if anyone should question him, Rubin should "stay with" the story that the horse belonged to Bonacorsa (Tr. 141-142, 244-246).[17/]

2. Defense testimony.

Martin Lentsch testified that he was involved in harness racing and had owned three or four race horses. He had known appellant for about four years. He had agreed to loan Bonacorsa $50,000 for the purchase of horses, which he and his son Matthew, a licensed harness driver, would purchase if Matthew liked a particular horse. In return, Bonacorsa agreed to train Matthew

17/ Shortly thereafter, Rubin was interviewed by F.B.I. agents and did in fact "stay with" this story. However, when he received a subpoena to appear before the grand jury, Rubin contacted an attorney and thereafter gave another statement to the F.B.I. and testified before the grand jury, providing, on both occasions, substantially the same information related at trial (Tr. 142, 144-147, 172, 183, 185-187, 197, 203-205).

as a driver and trainer in harness racing (App. 60-65, 79).[18] Bonacorsa's house served as collateral for the loan, though there was no written agreement to this effect; no lien on the house was obtained (App. 79-80). Matthew Lentsch went to New York to live and work with Bonacorsa in December of 1973; Mr. Lentsch gave his son $30,000 in cash to take with him, and in April 1973, gave his son an additional $20,000 in cash (App. 66, 69-73). Lentsch's further testimony that Bonacorsa used this money to purchase horses was stricken on the ground that Lentsch had no personal knowledge of these transactions (App. 66, 72-73). Mr. Lentsch testified that he made a slight profit as a result of the arrangement with appellant and also obtained an excellent brood mare, "Local Lie" (App. 75, 92-93).[19] The government moved to strike all of Mr. Lentsch's testimony

18/ On cross-examination, the agreement was clarified. If Bonacorsa was unable to repay the money within six to eight months, ownership of the horse would pass to Lentsch, which according to Lentsch's testimony, is precisely what occurred (App. 79; and see App. 93-94).

19/ Mr. Lentsch testified further in this regard that he received four horses from appellant and the following colloquy ensued:

Mr. Meyerson: Objection, your Honor, unless we have a period of time.

THE COURT: When did you receive these horses?

THE WITNESS: My son would know better. I'm a baker.

THE COURT: You don't know when the horses came?

THE WITNESS: Can I look?

THE COURT: What are you looking at?

(footnote cont'd.)

THE WITNESS: When the horses come. I'm a baker. They come--

THE COURT: You don't know.

THE WITNESS: Let me think, Oh, I would say February, after February--they come in February, and they sired them at Hawthorne--

THE COURT: February of this year?

THE WITNESS: February of '73, or '72, 73.

THE COURT: When in February?

THE WITNESS: Right after February 22nd. We sired them at Hawthorne.

THE COURT: All four arrived at once?

THE WITNESS: No, two. My son knows a lot better. I'm in South Bend, Indiana. I bake bread.

THE COURT: You don't really know.

THE WITNESS: I should say I don't know.

THE COURT: Strike it out, ladies and gentlemen He doesn't know. [App. 74-75]

February 22 is the date of the sale to Mary Bonacorsa as shown on the registration papers (Gov. Ex. 7).

Mr. Lentsch did subsequently testify, however, that he received the brood mare "Local Lie" and still owned her. This testimony was received over the government's objection subject to connection (App. 75-78). He also testified that Bonacorsa gave them the horses he purchased in lieu of repaying the loan (App. 92-93). He mentioned that he and his son had sold one of these horses, "Jet Butler" (App. 92). He reiterated his earlier testimony that as a result of the transaction he and his son "broke even" and in addition obtained an excellent brood mare (App. 92-94).

as irrelevant on the ground that it made no reference to the horse Joli Timmy. The court, however, received this testimony subject to connection (App. 94).

On cross-examination, Mr. Lentsch, a bakery owner in South Bend, Indiana, testified that his annual income from the bakery and investments was approximately $20,000 and that the income derived from his bakery business had diminished over the past few years (App. 80-82, 87). Mr. Lentsch then testified that he had not withdrawn the $50,000 in cash given to appellant from a bank account nor had he sold securities to obtain the money (App. 83). He stated further, that the $50,000 in cash was obtained "[f]rom around the house" (App. 83). In response to questioning from the court, Mr. Lentsch testified that he had kept the cash in an "iron barrel in the basement" and "upstairs on the porch" (App. 83-84, 87).[20/]

Martin Lentsch's son, Matthew Lentsch, testified that he came to New York in December of 1972, met appellant Bonacorsa and worked with him training horses for the next two years (App. 90-91). Pursuant to the agreement between his father and appellant, Matthew Lentsch gave appellant $30,000 (App. 100).

20/ His income from the bakery business had been approximately $9,000 during the past year, and $10,000 to $12,000 in 1972 and 1973 (App. 81).

When he testified that he and appellant purchased five horses, the court inquired whether he personally purchased any of the horses. After Lentsch responded that he had not, but had given appellant the money for the purchases, the Court struck his testimony that he and appellant had purchased the five horses (App. 99-100). Thereafter, Lentsch was asked whether he had personal knowledge that appellant used the money to purchase the horses and stated that he did. This colloquy ensued:

THE COURT: That is why I asked you the question, did you actually participate in the sale of the horses?

THE WITNESS: Yes.

THE COURT: Not what Mr. Bonacorsa did; did you participate in the purchase?

THE WITNESS: Yes.

THE COURT: Do you know what I mean by "Participate," were you there when the horses were purchased?

THE WITNESS: Yes.

THE COURT: Physically there when they were purchased?

THE WITNESS: Yes. [App. 101-102]

The witness then testified that he was present when all five horses were purchased with his father's money, that Joli Timmy was purchased in mid-February and the other four, including Jet Butler and Local Lie, in the next several weeks; the total

expended for these purchases was approximately $45,000 (App. 102-103). The witness stated that four of the horses were claimed and the other was purchased for cash (A. 103).[21] When the witness was asked what he did in order to have appellant claim a particular horse, the government objected that testimony as to transactions in regard to horses other than Joli Timmy was irrelevant; the court sustained the objection (App. 103-104).

Matthew Lentsch next testified that he first saw the horse Joli Timmy at appellant Bonacorsa's stable in February (App. 105). The Court then inquired whether the witness had in fact personally participated in the transaction regarding Joli Timmy and the witness responded that he had not, but that he had given appellant the money with which to purchase the horse (App. 105-106).[22] Thereupon, the court instructed the jury to disregard this testimony (App. 107).

Subsequently, Matthew Lentsch was examined outside the presence of the jury. He testified that after he had been in New York about six weeks, appellant told him that the horse Joli

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21/ It was undisputed that Joli Timmy was the horse purchased for cash.

22/ Defense counsel subsequently objected to the court's questioning of this witness and the court responded that Matthew Lentsch had "deliberately misled" the Court and that his questions were intended solely "to elicit full facts from the witness" (Tr. 39[illegible]).

Timmy was available if another prospective purchaser (Forrest Gerry), who had already made an initial payment of $1,000, did not buy the horse. When Gerry did not purchase the horse, he and appellant Bonacorsa decided to buy the horse for $4,000, which Lentsch gave to Bonacorsa. Two days later, he saw the horse at Bonacorsa's stable (App. 113-115). Thereafter, he and Bonacorsa worked with the horse, attending to his sore leg and training him. Then they qualified and subsequently raced the horse (App. 116-119). He testified further that around mid-September, ownership of the horse Joli Timmy passed from Mary Bonacorsa to him and that in October he sold the horse for $5,000 (App. 120, 133-135). He testified further regarding the transactions involving the other four horses appellant allegedly bought with the money his father provided (App. 119-123).

Matthew Lentsch also testified at this time that he had known Forrest Gerry since he was eleven years old (App. 122). He stated further that he did not know either Mr. Schweitzer or Mr. Rubin (Id.).

The court ruled that Matthew Lentsch could testify regarding his knowledge of the transaction in regard to Joli Timmy. The court ruled inadmissible any testimony regarding events occurring after appellant Bonacorsa's appearance before the grand jury on September 14, 1973, i.e., the alleged transfer of ownership from Mary Bonacorsa to Matthew Lentsch and Lentsch's

sale of the horse for $5,000 (App. 136-142).

Matthew Lentsch then testified before the jury that he gave appellant $4,000, of the $30,000 his father gave him, to purchase Joli Timmy and that he saw the horse two days later at Bonacorsa's stable at Yonkers (App. 145-146, 153). He and Bonacorsa worked on the horse's leg, gradually trained him, and after about a month qualified him. Thereafter, the horse raced and won a $5,000 purse, and also placed third in two subsequent races (App. 147-150, 154). He testified further that about a week after the sale, he saw the bill of sale for the horse (Def. Ex. B) at appellant Bonacorsa's home (App. 151-152). According to his testimony, he observed Mary Bonacorsa write a check for the sales tax on the horse and that he and appellant mailed the check (App. 152-153). Lentsch also testified that Forrest Gerry had nothing to do with the horse (App. 154). He stated further that he was unaware of any other aspect of the agreement to purchase Joli Timmy, specifically, the seller's option to buy another horse (App. 158).

3. The jury's deliberations.

During the course of its deliberations the jury sent to the Court a note requesting (1) a copy of the indictment, (2) the bill of sale, and (3) the registration of Joli Timmy (App. 247). Considerable dispute arose as to whether the entire registration on the horse had been admitted in evidence, defense counsel con-

tending that it had (Tr. 563-577, 590-593; and, see, Tr. 35, 38-43, 46-47, 52-54). The registration of Joli Timmy was introduced through the testimony of the registrar for the U. S. Trotting Association. On cross-examination, defense counsel did elicit that the papers showed a transfer of ownership from Mary Bonacorsa to Matthew Lentsch, and a subsequent transfer from Lentsch to the International Thoroughbred Agency in Australia (Tr. 46-47). However, none of the exhibits received in evidence reflected these transfers. Government Exhibit 6 reflects two transfers: (1) from Capital Hills Farm, Inc. (Filion) to Richard Schweitzer (7/12/72), and (2) from Richard Schweitzer to Leonard Schweitzer (10/10/72). Government Exhibit 7 showed the transfer from L. Schweitzer to Mary Bonacorsa on February 23, 1973. Government Exhibit 8 showed four transfers between May 1968, and January 1972. None of the exhibits introduced and received at trial reflected the transfer from Mary Bonacorsa to Matthew Lentsch or the transfer from Lentsch or the transfer from Lentsch to the International Thoroughbred Agency. The court accordingly refused to give the jury the entire registration of the horse and reiterated its ruling that such evidence was inadmissible because it occurred after appellant's grand jury appearance on September 14, 1973 (Tr. 567; and see generally, Tr. 563-581, 590-593, 634-636).

The jury subsequently sent a second note to the Court which in substance inquired whether the perjury count of the indictment

(count 1) included the allegation that appellant had given false testimony on material matters when he denied having had any business relationship with Forrest Gerry (App. 248; Tr. 581-590). This allegation did not appear in the original indictment, but was made in the superseding indictment (App. 6-7, 9-13; and see, supra, at pp. 9-10). It was determined that the jury had erroneously received, in response to its first request, a copy of the original indictment.

The court explained the error to the jury and provided them with a copy of the superseding indictment (Tr. 581-589). Appellant moved for a mistrial. The Court denied the motion, observing that the defendant had suffered no prejudice as a result and that, if anything, the mistake had prejudiced the government (Tr. 588-590, 593, 596-598, 611). The court's offer to instruct the jury to disregard the first indictment and to explain the purpose of a superseding indictment was refused by defense counsel (Tr. 593, 597). The court did thereafter instruct the jury that the superseding indictment was simply a corrected indictment returned by the same grand jury; the court also emphasized its earlier instruction that an indictment was nothing more than a charge and did not constitute evidence of any kind and admonished the jury that the fact that a superseding indictment was returned is not evidence of any kind (Tr. 608). Appellant objected to the court's instruction and renewed his motion for a mistrial, which was denied (Tr. 609-610).

ARGUMENT

I. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTIONS

Appellant Bonacorsa contends that the evidence was insufficient to sustain his convictions for perjury (18 U.S.C. 1623) and obstruction of justice (18 U.S.C. 1503).

1. The claim of insufficiency with regard to the perjury conviction rests on the proposition that the evidence failed to establish that appellant was not the actual owner of the horse Joli Timmy (Point I, Br. at 12-14). At the outset we note that although the evidence was ample on this point, appellant also falsely denied to the grand jury that Forrest Gerry had ever acted as his agent in the purchase or sale of horses or that he had ever had any business dealings with Gerry.

The questions asked of appellant before the grand jury were aimed at determining whether Forrest Gerry was the hidden owner of any horses ostensibly owned by appellant. The materiality of this inquiry was conceded (Tr. 17, 31). Appellant was asked before the grand jury whether he had ever purchased race horses for Forrest Gerry under his or his wife's name, or anyone else's name. At his appearance before the grand jury on September 14, he unequivocally denied that he had. In his appearance before the grand jury on December 19, he testified that he purchased the horse Joli Timmy directly from Steve Ruben. He testified further that he had never bought or sold horses from Gerry and that Gerry had never acted as his agent in purchasing

or selling horses; in fact appellant disavowed having ever had any business dealings with Forrest Gerry, with one exception, the sale of a goat to Gerry ten years earlier.

The testimony of the government witnesses was completely contrary to appellant's grand jury testimony. Both the owner of the horse Joli Timmy, Richard Schweitzer, and the horse's trainer, Steven Rubin, testified that the horse was purchased by Forrest Gerry, who made an initial cash payment of $1000 to Schweitzer, and paid the balance of $2500 in cash to Rubin. In addition, Schweitzer received from Gerry an option to purchase another horse, which was in fact delivered although the option was not exercised. Appellant Bonacorsa did not participate in the negotiations nor was he represented to be the purchaser. It was undisputed that Gerry was not licensed to race horses owned by him and thus the impetus to conceal his ownership of horses that did race, as Joli Timmy did, was clear. Consistent with a scheme of hidden ownership, Mary Bonacorsa was shown as the owner on the registration papers which Rubin gave to Bonacorsa in blank when he delivered the horse.[23] Rubin also testified that shortly before Gerry was indicted, as a result of the investigation which was common knowledge in the harness racing industry, appellant obtained from Rubin a back-dated bill of sale and instructed him to show Mary Bonacorsa as the owner. Rubin met with Bonacorsa for this purpose at Gerry's direction. At the time of this meeting, Bonacorsa encouraged Rubin to say that the horse belonged to Bonacorsa if he was questioned about the matter. Appellant

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[23] It was undisputed that Bonacorsa trained the horse.

subsequently advised Rubin to stick with the story that Bonacorsa owned the horse if he were questioned. These reminders would hardly have been necessary if appellant had, as he testifed before the grand jury, purchased the horse directly from Rubin.

The defense testimony corroborated in certain respects appellant's testimony before the grand jury. The defense version of the transfer of ownership of the horse Joli Timmy was utterly contrary to the evidence offered by the government, which the jury was entitled to, and did, credit. United States v. Marchesio, 344 F.2d 653 (2nd Cir. 1965). Viewed in the light most favorable to the government [United States v. Gerry, 515 F.2d 130, 134 (2nd Cir. 1975)], the evidence was ample to support the jury's conclusion that appellant knowingly gave false testimony related to material matters before the grand jury.

2. In attacking the sufficiency of the evidence, appellant also argues that the questions asked of him before the grand jury were sufficiently ambiguous to support more than one reasonable interpretation (Point II, Br. at 14-19). Absent fundamental ambiguity, the question whether a witness knowingly gave false testimony is for the jury's determination. United States v. Wolfson, 437 F.2d 862, 878 (2nd Cir. 1970); United States v. Diogo, 320 F.2d 898, 907 (2nd Cir. 1963).

Contrary to appellant's suggestion, government counsel's questions were not in the least ambiguous and appellant's responses to those questions were unequivocal. The thrust of the questioning was clear and the import of the questions could not have escaped appellant's attention (see App. at 10-13).

Appellant argues, for example, that his testimony on December 19 that he "dealt with Steve" was a truthful response because the evidence showed that he had in fact dealt with Rubin when Rubin delivered the horse (Br. at 16-17). This portion of the grand jury testimony, alleged and proved to have been perjurous, immediately followed appellant's testimony that he had used money loaned to him by Lentsch to purchase five horses, four of which had been claimed. Government counsel then inquired: "What about the fifth horse?" Appellant responded that he bought the fifth horse "outright" from Steve Rubin. Government counsel then inquired: "And anybody else?" Appellant responded that he believed Rubin had a partner but that he had dealt with Rubin. The predicates for this latter question appear unambiquously in the preceeding questions and in nowise support the construction appellant would now place on his response.[24/]

24/ Appellant's reliance upon the Supreme Court's decision in United States v. Bronston, 409 U.S. 352 (1973) is misplaced. (footnote cont'd)

3. Appellant argues further that the evidence was insufficient to support his conviction for obstruction of justice (Br. at 20-29).

Steven Rubin testified that in September of 1973, shortly before Gerry was indicted, Gerry's girlfriend Connie Rogers telephoned him and as a result of their conversation he met with appellant Bonacorsa and in his presence prepared a backdated bill of sale which falsely showed Mary Bonacorsa as the purchaser. Although he was not permitted to testify as to the substance of his conversation with Connie Rogers, it is a fair inference that she conveyed to him Gerry's instructions regarding the bill of sale. Moreover, when he met with appellant, the latter instructed Rubin to make the bill of sale out to Mary Bonacorsa. At this time, Bonacorsa

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(footnote cont'd) In Bronston, the Court held that an unresponsive but literally true response, even if intended to mislead, will not support a conviction for perjury. Appellant concedes that the holding of Bronston has no application to this case (Br. at 18). He relies instead upon the Court's observation that "[p]recise questioning is imperative as a predicate for the offense of perjury" (409 U.S. at 362). Appellant submits several questions which he believes were more precise than those proffered by government counsel and objects particularly that no single question asked of appellant connected Forrest Gerry and the horse Joli Timmy (Br. at 18-19). It is clear, however, that government counsel's questions thoroughly and explicitly covered the matter. Moreover, the course of the questioning was to some extent dictated by appellant's false answers to questions asked.

also told Rubin that if there were an investigation of the matter and he was questioned about the horse's ownership, it would be "better for both of them" if Rubin said that Bonacorsa had purchased the horse. A few weeks later, Rubin saw Bonacorsa at the racetrack and inquired whether Bonacorsa had heard anything about Gerry. Rubin also told him that no one had as yet questioned him about the horse. Appellant responded that if he were questioned about the matter he should stay with the story that the horse belonged to Bonacorsa. Whether the bill of sale was in fact false and whether Bonacorsa was urging Rubin to relate a false story to any inquiring authority were clearly questions for the jury.

These events occurred at a time when the grand jury's investigation was common knowledge in the harness racing industry and at a time when appellant had appeared at least once before the grand jury and was therefore aware that the investigation concerned, at least in part, Gerry's hidden ownership of certain horses. Indeed, appellant in effect concedes that these factors were sufficient to show motive as well as knowledge that Rubin would be called as a grand jury witness, a factor appellant argues is an essential element of the offense under 18 U.S.C. 1503

(Br. at 28). See United States v. Turcotte, 515 F.2d 145, 149-150 (2nd Cir. 1975).

The jury could and did quite reasonably infer from this evidence that appellant's acts were calculated to impede an ongoing grand jury investigation.

II. THERE WAS NO VARIANCE BETWEEN COUNT THREE OF THE INDICTMENT AND THE PROOF ADDUCED AT TRIAL

Appellant also argues that there was a material and prejudicial variance between the indictment and the proof adduced at trial (Br. at 20-29).

Counts 2 and 3 of the indictment alleged that appellant had corruptly endeavored to obstruct the due administration of justice by influencing Rubin to give material false testimony before the grand jury. The two counts are identical, except for the dates. Count 2 alleged an obstruction of justice occuring during the last week of February, 1973. (Appellant was acquitted on this count.) Count 3 alleged an obstruction of justice occuring in September, 1973. The grand jury indicted appellant in count 2 on the basis of Rubin's grand jury testimony, in which he stated that he had prepared the false bill of sale at the direction of appellant and Gerry's girlfriend, Connie Rogers, approximately two weeks after the

sale, which would have been towards the end of February. At trial, he acknowledged that he had been mistaken in this testimony as the incident had actually occurred in September, 1973. The grand jury indicted appellant on count 3, on which appellant was convicted, solely on the basis of Rubin's grand jury testimony, wholly consistent with his trial testimony, that Bonacorsa and he had met at the racetrack in September, that Rubin had asked whether Bonacorsa had heard anything yet about Gerry, and that Bonacorsa told him that there had been nothing thus far and that Rubin should stay with the story that Bonacorsa owned the horse if he were questioned about the transaction.

Appellant's claim that this disparity in Rubin's testimony before the grand jury and that offered at trial deprived him of the right to be tried on the indictment returned by the grand jury is specious. As noted, he was acquitted on count 2 of the indictment. Regarding the third count, the grand jury concluded that a single incident occurring in September was sufficient to warrant a charge of obstruction of justice. This incident was proved at trial. The government was not foreclosed from adducing

additional proof on count 3 at trial. Indeed, this is very like the situation which arises when additional proof in support of a charge surfaces after the grand jury has returned an indictment. Clearly, the government is not bound at trial to limit its proof to the evidence which was before the grand jury. Count 3 of the indictment charged that in the month of September, 1973, appellant obstructed the due administration of justice by influencing a potential grand jury witness, Steven Rubin, to testify falsely as to material matters. This is precisely what the evidence adduced at trial showed. Thus, appellant is incorrect in suggesting that there was a variance between the indictment and the proof offered in support of the charge.[25]

Nor is there any merit to appellant's suggestion that he was misled by the bill of particulars, which advised that count three concerned matters occurring "shortly after or about the time that Forrest Gerry was arrested. . ." (App. 269). This representation comports substantially with Rubin's

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25/ Had appellant been convicted on count 2, there would have been a variance between the time period alleged in the indictment (February) and that proved at trial (September). The inquiry would then be directed at determining whether appellant's substantial rights had been adversely affected as a result. See, e.g., United States v. D'Anna, 450 F.2d 1201, 1204 (2nd Cir. 1971).

testimony that the circumstances attending preparation of the false bill of sale occurred shortly before Gerry was indicted. The bill of particulars also apprised the defense that both counts charging obstruction of justice derived from Bonacorsa's having told Rubin to say that the horses belonged to Bonacorsa, not Gerry (Br. at 20; App. 269).

The variance which appellant contends was prejudicial was not between the charge in the indictment and the proof adduced at trial; rather the variance was between one aspect of certain evidence presented to the grand jury and that offered at trial. Appellant's rights were not affected by this disparity.

III. THERE WAS NO ABUSE OF DISCRETION IN THE TRIAL COURT'S RULINGS THAT CERTAIN TESTIMONY PROFERRED BY THE DEFENSE WAS INADMISSIBLE

Appellant first contends that the trial court erred in excluding the testimony of Martin Lentsch (Mr. Lentsch, Sr.). In fact, the trial judge did not strike Martin Lentsch's testimony. Although Martin Lentsch had no personal knowledge concerning appellant Bonacorsa's alleged purchase of horses with money Lentsch had loaned him for that purpose, and although the witness did not even mention the horse Joli Timmy

in his testimony (nor was an offer made in this regard), the trial court denied the government's motion to strike all of his testimony on these grounds and received his testimony "subject to connection."[26/] Martin Lentsch was able to testify as to his alleged agreement with appellant, that appellant gave him and his son the horses in lieu of repaying the loan, that he made a slight profit as a result of the arrangement, that he still owned one of the horses he had received pursuant to the arrangement and that he had sold another of the horses (supra at pp. 14-17; App. 60-66, 69-73, 75-79, 92-94).

Although there was considerable dispute at trial regarding the admissibility of certain portions of Matthew

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26/ The trial court told the jury that if this testimony were not connected he would instruct them to disregard it (App. 94). Subsequently, at the conclusion of Matthew Lentsch's (Mr. Lentsch, Jr.) testimony and after considerable dispute as to the admissibility of certain portions of his testimony, the court advised the jury that even though he had at one point instructed them to disregard all of the testimony of the two Lentsch's, they "could accept the testimony of Mr. Lentsch, Sr., to the extent the Court permitted it, and the testimony of Mr. Lentsch, Jr., to the extent that the Court permitted it (App. 404-405). In fact, the court had not previously instructed the jury to disregard all of the testimony of Martin Lentsch. In any event, the court's final ruling permitted the jury to consider Mr. Lentsch, Sr.'s testimony subject to the evidentiary rulings made during the course of that testimony.

Lentsch's testimony, and proffered testimony (supra at pp. 17-21), appellant is incorrect in suggesting that the jury was not entitled to consider Lentsch's testimony regarding certain matters (Br. at pp. 30-31).[27] The court's remarks to the jury, which appellant contends withdrew certain matters from the jury's consideration (Br. at 30), included an instruction that the jury was not to consider Matthew Lentsch's previous testimony that he personally participated in the sale of the horse Joli Timmy. This instruction was appropriate in view of the witness' utterly contradictory representations in this regard. He testified at one point that he was actually present when appellant Bonacorsa purchased the horse Joli Timmy. Subsequently, he testified that he had not actually been present. Accordingly, the trial court quite properly instructed the jury to disregard his previous testimony indicating that he had personally participated in the transaction.[28] The witness was

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27/ Appellant contends that the jury was not permitted to consider Lentsch's testimony that appellant exercised dominion and control of the horse on a daily basis after the purchase, that appellant trained and raced the horse, that Lentsch saw a bill of sale for the horse at appellant's house a week after the purchase, and his further testimony that Forrest Gerry had nothing to do with the horse (Br. at pp. 30-31).

28/ The trial court believed he had been "deliberately misled" by this witness and indeed his utterly contradictory statements do not suggest any other interpretation. In his remarks to the jury, however, the court--generously in our view--stated that the witness had "been under the mistaken impression of what the Court meant by the word participated" (App. 144).

thereafter permitted to testify that he gave appellant $4,000 with which to purchase the horse Joli Timmy and that two days later he saw the horse at appellant's stable at Yonkers Raceway (App. 145-146, 153; supra at p. 21).

The court's further remarks to the jury merely noted that at least a portion of Mr. Lentsch's testimony was being offered for the purpose of demonstrating appellant Bonacorsa's financial ability to purchase the horse Joli Timmy (App. 144; Br. at 30). These remarks, in context, were obviously made in regard to anticipated testimony that Matthew Lentsch gave appellant the money with which to purchase the horse. The court concluded his remarks by stating, "and the rest of the evidence he'll be permitted to testify to" (Id.). Thereafter, the witness testified that after the purchase he and Bonacorsa had worked on the horse's leg and gradually trained the horse. Eventually they entered him in a qualifying race and subsequently entered him in several races. He also testified that he had seen a bill of sale for the horse at appellant's house about a week after the purchase and that he had observed Mary Bonacorsa write a check for the sales tax on the purchase of Joli Timmy. He further stated that Forrest Gerry had had nothing to do with the horse. Subsequently, the court instructed the jury that although he had at one point instructed them to disregard Matthew Lentsch's testimony, they

were entitled to consider his testimony to the extent the court had permitted it (Tr. 405).

Appellant also suggests that he was "effectively precluded...from presenting any defense at all" because the trial court's rulings, he argues, left the jury with the impression that unless Bonacorsa personally delivered the money for the horse, he could not have owned it (Br. at 29-30, and n.14). The trial court's rulings were aimed at precluding testimony regarding the actual purchase of the horse by individuals who were not present. Lentsch, Sr., who proffered no testimony regarding the horse Joli Timmy, was permitted to testify as to his ostensible arrangement with appellant, and Lentsch, Jr. was permitted to testify that pursuant to this arrangement he gave appellant $4,000 with which to purchase Joli Timmy. Appellant concedes that the defense did not contest that Gerry actually paid Rubin and Schweitzer the money for the horse (Br. at 30, n.14). Contrary to appellant's suggestion, however, it was not this factor which precluded appellant from arguing as a theory of defense that he was the real owner of the horse and Gerry merely acted as his agent. Appellant's grand jury testimony that Gerry had never acted as his agent in the purchase of a horse and that he had had no business dealings with Gerry precluded this line of defense.

In sum, appellant's contentions that the testimony of Martin Lentsch was excluded and that the court's remarks to the jury precluded its consideration of specified protions of Matthew Lentsch's testimony are not substantiated by the record.

IV. THE TRIAL COURT'S QUESTIONING OF DEFENSE WITNESSES WAS NOT IMPROPER

Appellant contends that the trial court improperly questioned defense witnesses Martin and Matthew Lentsch (Br. at 31).

The only objection made at trial (Tr. 396-397) was to the court's questioning of Mr. Lentsch, Sr., regarding his testimony that the $50,000 in cash which he ostensibly gave to appellant was taken "from around the house," supra at p. 17. Following this testimony, the court asked the following questions:

THE COURT: You had $50,000 in cash lying around the house?

THE WITNESS: Yes. We still have some.

THE COURT: Where do you keep it?

THE WITNESS: Basement, in a barrel, iron barrel down in the basement. Some upstairs on the porch.

MR. CASTELLANO: (defense counsel): Judge, what was the address of the house?

THE WITNESS: My folks lost a lot of money in 1930.

BY MR. MEYERSON: (government counsel):

Q. Will you please wait.

A. I'm just telling him. I'm getting my point across boy.

THE COURT: You have savings banks?

THE WITNESS: Yes.

THE COURT: In South Bend?

THE WITNESS: Yes.

THE COURT: Do they pay interest on the money?

THE WITNESS: Oh, five and a quarter.

THE COURT: All right.

THE WITNESS: They can fold up. I keep some money home. They fold fast when they fold.

THE COURT: Have you ever heard of Federal Deposit Insurance?

THE WITNESS: Yes. I don't know how solid that is, they can change, too. The dollar is going down the drain. I don't mean to be wise, but silver is best and gold. [App. 84-85]

Defense counsel did not object to this questioning until after the conclusion of Mr. Lentsch, Jr.'s testimony. The court responded to this objection by stating that the witness' response that he kept that amount of cash around the house raised a question as to whether the witness was "being perfectly frank and candid" and that his questions were intended to discover "whether he was doing this for some particular reason, or whether it was just as odd as it seemed" (Tr. 397-398). Moreover, the court subsequently admonished the jury to draw no inferences relative to the question of guilt

or innocence from any questions asked by the court and advised them further that the court had no opinion on the question of guilt or innocence (Tr. 404, 556). See United States v. D'Anna, 450 F.2d at 1206-1207.

It was entirely proper for the court to seek to clarify Mr. Lentsch Sr.'s testimony in this regard. See, e.g., United States v. McCarthy, 473 F.2d 300, 308 (2nd Cir. 1972); United States v. minski, 418 F.2d 1060, 1062 (2nd Cir. 1969), cert. den., 397 U.S. 1075. In any event, we doubt that any action on the court's part could have made this testimony appear more incredible than it did.[29/]

29/ On another occasion the court's questions of prosecution witness Steven Rubin served to clarify his testimony that appellant told him that it would be "better for both of them" if Rubin told any inquiring authority that the horse belonged to Bonacorsa. Rubin's response to the court's questions indicated that he understood appellant's remark to suggest a disassociation from Gerry, rather than an implicit threat (Tr. 245-246, 251-252).

Appellant does not specify which questions asked by the Court were objectionable, except to refer to defense counsel's objection at trial which was, as noted, directed to questions asked of Mr. Lentsch, Sr. However, appellant does contend that the court's questioning of Mr. Lentsch, Jr. was improper (Br. 31). However, it is clear that the court's questioning regarding Mr. Lentsch, Jr.'s participation in the sale of Joli Timmy properly precluded the witness from conveying to the jury the false impression that he had, as he at one point testified, been personally present when appellant purchased Joli Timmy. United States v. McCarthy, supra; United States v. Tyminski, supra. Indeed, in our judgment the court was far too generous to appellant in suggesting to the jury that Lentsch, Jr. had simply been under a mistaken impression as to what the court meant by the term participate. Lentsch, Jr. gave utterly contradictory testimony in this regard in response to unequivocal questions.

V. THE TRIAL COURT'S RESPONSES TO REQUESTS MADE BY THE JURY DURING THE COURSE OF ITS DELIBERATIONS DID NOT DEPRIVE APPELLANT OF A FAIR TRIAL

Appellant contends that the cumulative effect of three incidents which occurred during the jury's deliberations was to deprive him of a fair trial (Br. at 31-36). He expressly does not contend that any one of these incidents, standing alone, is sufficient to warrant reversal. Accordingly, if any one of these claims is insubstantial, appellant's argument that he was deprived of a fair trial as a result of the cumulative effect of these incidents must fail.

1. As stated previously (supra, at pp. 21-22), the jury requested the registration papers on Joli Timmy during the course of its deliberations. In fact, only certain portions of the horse's entire registration were received in evidence (Gov. Exs. 6, 7 and 8). Although considerable and understandable dispute arose as to which portions of the registration had been received in evidence (see Tr. 43), an examination of these exhibits clearly shows that the portions of the registration which were received did not include any transfer occurring after February 22, 1973, when ownership of the horse allegedly passed from Mr. Schweitzer to Mary Bonacorsa. In other words, the subsequent registration records which indicated a transfer from Mary Bonacorsa to Matthew Lentsch on September 23, and a subsequent

transfer from Lentsch to the International Thoroughbred Agency in October, were never received in evidence, as shown by an examination of the exhibits themselves.[30/] Contrary to appellant's contention (Br. at 31-32), it was not error for the trial court to refuse to submit to the jury documentary evidence which had never been received in evidence.

It is clear that the trial court intended to exclude from evidence these transfers occurring after appellant's appearance before the grand jury on September 14. Although testimony that the registration papers reflected a transfer of ownership from Mary Bonacorsa to Matthew Lentsch on September 22, was elicited from the U. S. T. A. registrar on cross-examination, the trial court subsequently ruled that Matthew Lentsch could not testify as to events occurring after appellant's appearance before the grand jury on September 14. The real thrust of appellant's argument is that this ruling was erroneous (Br. at 32). However, it is within the trial court's wide discretion regarding questions of admissibility to exclude evidence of a defendant's conduct following commission of the crime. Post v. United States,

30/ Appellant does not contend that these subsequent transfers were at any point redacted from the exhibits. Although the trial court did state, consistent with its earlier ruling, that it would exclude this portion of the registration if it had in fact been placed in evidence, the evidentiary ruling at this juncture was of no effect since that portion of the registration papers had not in fact been admitted.

407 F.2d 319, 324-325 (D.C. Cir. 1968), cert. den., 393 U.S. 1092. See, also, Hale v. United States, 406 F.2d 476, 480 (10th Cir. 1969); Oliver v. United States, 396 F.2d 434, 436 (9th Cir. 1968); Hayes v. United States, 227 F.2d 540, 543-544 (10th Cir. 1955); Barshop v. United States, 191 F.2d 286, 292 (5th Cir. 1951), cert. den., 342 U.S. 920. And, see, United States v. Lieblich, 246 F.2d 890, 894 (2nd Cir. 1957), cert. den., 355 U.S. 896. Cf. United States v. Roell, 487 F.2d 395, 399-400 (8th Cir. 1973); United States v. Frost, 431 F.2d 1249, 1251 (1st Cir. 1970), cert. den., 401 U.S. 916; United States v. Higgens, 362 F.2d 462, 465 (7th Cir. 1966), cert. den., 385 U.S. 945; United States v. Stoehr, 196 F.2d 276, 282 (3rd Cir. 1952).

In Post v. United States, supra, the court, after having discussed the wide latitude afforded trial judges on questions of admissibility and the reasons underlying this policy [407 F.2d at 322-324], noted that under certain circumstances a defendant's conduct following the alleged offense may constitute admissible evidence bearing on innocence [407 F.2d at 324]. The court went on to observe, however, that "an ever-present reason demanding latitude for the ruling on admissibility is that what takes place, particularly after the fact, is 'often feigned and artificial'" [407 F.2d at 325; footnote omitted]. Accordingly, "it is [the trial court's] responsibility to calculate and weigh the propensities of the proffered evidence in both directions in determining

whether it has a 'plus value' favoring its admission" [Id., footnote omitted]. The trial court here evinced a sound exercise of discretion in this regard.

The court had every reason to conclude that the alleged transfer of the horse Joli Timmy from Mary Bonacorsa to Matthew Lentsch was a fabrication intended to conceal the true facts regarding the ownership of the horse and calculated to lend credence to appellant's testimony before the grand jury on September 14. The prosecution witnesses, who had no motive to testify falsely in this regard, testified that the horse was purchased by Forrest Gerry. Appellant not only denied in his grand jury testimony that any horses ostensibly owned by him were actually owned by Gerry, but also stated that Gerry had never acted as his agent in the purchase of any horse and that he had in fact had no business dealings with Gerry. Appellant now appears to concede that this latter testimony was false (Br. at 30, n.14). Rubin's testimony also showed that Bonacorsa had him prepare a false bill of sale for the horse and that appellant had importuned Rubin to tell any inquiring authority that Joli Timmy was owned by Bonacorsa, actions which would hardly have been necessary if Bonacorsa had in fact, as he stated to the grand jury, personally purchased Joli Timmy directly from Rubin. Moreover, the trial court understandably had serious doubts as to the veracity of Mr. Lentsch Sr.'s testimony, in view of his statements that although he earned a maximum

of $20,000 a year, he had kept in excess of $50,000 in cash in an iron barrel in the basement and on an upstairs porch of his home. The trial court also believed, with good reason, that Mr. Lentsch, had deliberately deceived the court and jury when he stated that he had personally been present when appellant purchased Joli Timmy. Under these circumstances there was no abuse of discretion in the court's exclusion of evidence of appellant's conduct following his appearance before the grand jury on September 14. Post v. United States, supra.

2. There is no merit to appellant's further contention that he was prejudiced because the jury, in response to its request, was given a copy of the original indictment rather than the superseding indictment (Br. 33-35).

Because of this error, the jury subsequently sent this note to the court:

> The jury would like to know whether "count one" starts with the questions on whether the defendant had any business relationships with Forrest Gerry or whether it strictly deals with the questions and answers in count one. [App. 248]

The trial court explained to the jury that they had mistakenly received a copy of the wrong indictment and provided them with a copy of the superseding indictment (Tr. 587-588). It is clear that the jury was confused because its recollection of the charges in count 1 of the indictment did not coincide with the copy of the

indictment they received. Contrary to appellant's suggestion (Br. at 34-36), the matter was fully clarified when the court explained the mistake to the jury and provided them with a copy of the correct indictment, which did correspond to the jury's recollection of the charges.

Appellant also contends that because the jury had the wrong indictment for a period of time, he was denied the "right to be tried only on the basis of facts placed in evidence at trial" (Br. at 33-34). However, there were no allegations in the original indictment which did not also appear in the superseding indictment, which additionally alleged false testimony regarding material matters in appellant's grand jury testimony on December 19. The court denied appellant's motion for a mistrial on this ground, and repeatedly expressed its view that any possibility of prejudice redounded to the government's detriment (supra at p. 23).[31/] Moreover, the trial court, over the objection of defense counsel, reiterated its earlier instruction that an indictment was merely a charge and was not to be regarded as evidence of any kind (Tr. 608).

31/ For a period of time, submission of the wrong indictment may have prejudiced the government since the jury's attention was directed to allegations far narrower than those presented by the superseding indictment and the proof offered at trial. However, any resulting prejudice was cured when the jury received the correct indictment before verdicts were returned.

The trial court also explained that the superseding indictment was simply a corrected indictment returned by the same grand jury and admonished the jury that the fact that a superseding indictment was returned was not to be regarded as evidence of any kind (Id.). These circumstances do not substantiate appellant's claim that he was prejudiced by this inadvertent error.

VI. THE PROSECUTOR'S QUESTIONING AND COMMENTS WERE NOT IMPROPER

Appellant contends that an allegedly misleading statement made during the government's opening remarks, the use of leading questions during the examination of government witness Steven Rubin, and comments made during the government's summation, served to deprive him of a fair trial (Br. at 42-46).

Appellant specified the following remark made in the prosecutor's opening statement: "***[appellant] attempted to deny that Forrest Gerry, Jr. had anything whatsoever to do with the horse Jolly Timmie (sic). Mr. Bonacorsa claimed he owned the horse Jolly Timmie (sic), that he negotiated and paid for the horse and Forrest Gerry had no connection with it whatsoever" (Tr. 3-4; Br. at 43). This was a permissible description of what the evidence subsequently adduced showed. The prosecutor was not confined to a verbatim account of appellant's testimony before the grand jury.

With regard to the one question set forth in appellant's brief as an example of the prosecuting attorney's leading questions of the witness Steven Rubin (Br. at 44), appellant offered no objection to this question on that ground at trial and has accordingly waived the error, if any, at this juncture (Tr. 246-248). The question was asked on redirect examination and pertained to matters pursued on cross-examination (Tr. 246-247).

Finally, appellant contends that the prosecutor "repeatedly made statements of personal opinion as to

Mr. Bonacorsa's guilt, accused Mr. Bonacorsa of crimes not charged in the indictment, and misstated the record" (Br. at 44). Appellant states further his "hesitan[cy] to isolate particular comments," "[b]ecause virtually every page of the transcript of the prosecutor's summation bristles with prejudicial remarks..." (Br. at 45). We will address the two examples which appellant does specify.

Appellant offers the same objection to certain portions of the summation that was made concerning the prosecutor's comment in his opening statement. Appellant does not actually specify portions of testimony; he merely refers to pages of the transcript (Br. at 45). The thrust of these various remarks was the suggestion that appellant was questioned before the grand jury regarding all the details of his relationship with Gerry and all of the details concerning the purchase of the horse Joli Timmy (Tr. 461, 477, 481, 486-487). These were permissible comments in view of appellant's grand jury testimony which clearly shows that he was questioned regarding the details of his relationship with Gerry and the details of the purchase of the horse Joli Timmy. Moreover, the remarks were an appropriate response to defense counsel's argument that the evidence did not support the inference that appellant had intended to deceive the grand jury. See, e.g., United States v. Brown, 456 F.2d 293, 295 (2nd Cir. 1972), cert. den. 407 U.S. 910; United States v. Dibrizzi, 393 F.2d 642, 646 (2nd Cir. 1968).[32/]

32/ We note that the jury was, of course, instructed that the questions and remarks of counsel were not to be regarded as evidence (Tr. 495, 506, 552).

Appellant also specifies the following comment by the prosecutor as a misstatement (Br. at 45-46):

> He, Steven Rubin, even backed up on direct examination, he said yes, keep to the story, and if you remember Mr. Castellana examined him about the word, and he said, why shouldn't he -- he said, "Yes, those are his exact words." [Tr. 467].

Appellant did not include the comment immediately following this one:

> Did you see the pain in his face? He was trying to think back. I can't say for sure those were the exact words, maybe the substance. I can't say for sure. [Tr. 467].

In this portion of the summation the prosecutor was responding to defense counsel's attack on the credibility of Steven Rubin; he was making the point that if the government had induced Rubin to lie, it could have been much more effective (Tr. 464-466). He was citing Rubin's equivocal testimony as to the second conversation with Bonacorsa as an illustration of this point; although he misspoke in the comment specified by appellant, the prosecutor's second comment makes it quite clear that he was referring to and relying upon Rubin's candid inability to recall appellant's exact words.[33/]

33/ In this section of his brief, appellant alludes to "a blatant violation of the government's Brady [v. Maryland, 373 U.S. 83 (1963)] obligation in response to a defense discovery motion..." (Br. at 42). Appellant does not argue the point; he merely states that the prosecutor "failed to disclose a government tape recording of a conversation in which Forrest Gerry unequivocally states that he was not the hidden owner of any of Joseph Bonacorsa's horses" (Br. at 42, note 20). Appellant's failure to pursue this point is explained by the fact that his counsel had already received the recording in a previous case arising out of the same investigation [United States v. Gerry, 515 F.2d 130] (App. 275). Cf. United States v.
(footnote cont'd)

VII. THE TRIAL COURT PROPERLY DENIED APPELLANT'S POST-TRIAL MOTION TO VACATE THE JUDGMENTS OF CONVICTION AND DISMISS THE INDICTMENT

Appellant contends that the judgments of conviction must be vacated and the indictment dismissed because the government had decided to indict him prior to his appearance before the grand jury on December 19, 1973 (Br. at 36-40). Alternatively, appellant argues that this result is warranted because as a "putative" or "virtual" defendant he was entitled to receive and allegedly did not receive full Miranda warnings when he appeared before the grand jury on December 17 (Br. at 41-42). Following an evidentiary hearing on these matters, these contentions were rejected by the district court (App. 283-290).

1. Prior to his appearance before the grand jury on September 14, appellant was apprised that he was a potential defendant. On December 13, government counsel, Mr. Meyerson, wrote to the Department of Justice in Washington requesting authorization to seek an indictment against appellant for perjury and obstruction of justice. Appellant was one of numerous individuals as to whom such authorization was sought (H. 10). During the period between appellant's September

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(footnote cont'd) Brawer, 496 F.2d 703 (2nd Cir. 1974), cert. den., 419 U.S. 1051; United States v. Purin, 486 F.2d 1363, 1368 at n. 2 (2nd Cir. 1973), cert. den., 417 U.S. 930; United States v. Soblen, 301 F.2d 236, 242 (2nd Cir. 1962), cert. den., 370 U.S. 944.

and December grand jury appearances, Mr. Meyerson conferred on several occasions with appellant's attorney, Mr. Polina. Mr. Polina was advised that the government had serious doubts concerning the veracity of appellant's previous grand jury testimony, but was still very much interested in obtaining appellant's cooperation (H. 22, 24, 32). Mr. Meyerson urged Mr. Polina to attempt to persuade appellant to cooperate with the investigation (H. 24).

Following the last of these conversations, it was agreed that appellant would testify before the grand jury on December 17. In lieu of testifying before the grand jury, which did not meet due to the absence of a quorum, appellant's deposition was taken, with the understanding that it would be submitted to the grand jury. Appellant's counsel was present when the deposition was taken. On December 19, appellant appeared before the grand jury and adopted the deposition.

Appellant's contention that he should not have been summoned to appear on December 19 because he was then a prospective defendant is foreclosed by the decisions of this Court. A "potential defendant" does not, as a consequence

of that status, enjoy an immunity from the grand jury's subpoena power, for such a ruling "would denude that ancient body of a substantial right of inquiry." United States v. Winter, 348 F.2d 204, 207 (2nd Cir. 1965), cert. den., 382 U.S. 955. See also, United States v. Del Toro, 513 F.2d 656, 664 (2nd Cir. 1975); United States v. Sweig, 441 F.2d 114, 121 (2nd Cir. 1971), cert. den., 403 U.S. 932. Cf. United States v. Remington, 208 F.2d 567 (2nd Cir. 1954), cert. den., 347 U.S. 913. This was a "continuing investigation" into race fixing in the harness racing industry, and appellant could have been a valuable witness. United States v. Del Toro, supra, 513 F.2d at 664. There was a "legitimate interest in summoning" appellant before the grand jury [United States v. Winter, supra, 348 F.2d at 208], that is, the hope - if not the expectation - that appellant would cooperate with the grand jury. Accordingly, appellant's status as a potential defendant did not render him immune from grand jury process.

2. Appellant next contends that at the time of his appearance before the grand jury on December 19, he was a "putative" or "virtual" defendant and should therefore have received full Miranda warnings. He contends that he was not

adequately apprised of his rights and that his testimony must therefore be suppressed. Appellant relies on the decision in United States v. Mandujano, 496 F.2d 1050 (5th Cir. 1974), cert. granted, __ U.S. __, 95 S.Ct. 1422. Contra: United States v. Scully, 225 F.2d 113, 116 (2nd Cir. 1955), cert. den., 350 U.S. 897; United States v. Corolla, 413 F.2d 1306 (2nd Cir. 1969), cert. den., 396 U.S. 958. There is, however, no basis for appellant's contention that the rationale of Mandujano applies to this case, for it is clear that appellant's rights were fully protected.

Prior to his September 14 appearance, appellant received full Miranda warnings (App. 287) and was advised of his status as a prospective defendant. Counsel was present outside the grand jury room when he testified. His status as a prospective defendant was subsequently confirmed in conversations between Mr. Meyerson and Mr. Polina, when the latter was advised that there were serious doubts as to appellant's veracity in his testimony before the grand jury and was importuned to divert appellant from this course and encourage his full cooperation. When his deposition was taken on December 17 and when he appeared before the grand jury to adopt it on December 19, he was apprised of his "right to remain silent"[34] and any

34/ As we have argued in Mandujano, there is no right to remain silent before the grand jury (Brief for the United States, No. 74-754).

legal compusion to testify was thereby removed. On both occasions, appellant stated his willingness to testify. While these factors are sufficient to show that appellant's rights were fully observed, an additional factor is competely dispositive of his claim. When his deposition was taken on December 17, his counsel was at his side. Nothing in Miranda v. Arizona, 384 U.S. 436 (1966) suggests that in a custodial situation the presence of counsel is not sufficient to fully protect a defendant's rights under the Fifth Amendment. A fortiori, presence of counsel was sufficient to protect appellant's rights in a non-custodial setting. See, United States v. Del Toro, supra, 513 F.2d at 664.[35/]

In any event, appellant's motion to suppress his grand jury testimony on the ground that the requirements of Miranda were not met, was not raised until after trial and he accordingly waived the right to seek suppression on that ground. E.g. United States v. Sisca, 503 F.2d 1337, 1348, 1349 (2nd Cir. 1974), cert. den., 419 U.S. 1008; United States v. Ellis, 461 F.2d 962, 969 (2nd Cir. 1972), cert. den., 409 U.S. 866.

35/ We are submitting with this brief copies of the government's brief in the Supreme Court in United States v. Mandujano, No.74-754 (supra, note 34). While it is unnecessary to hold this case pending a decision in Mandujano since appellant's rights were fully protected, our brief in Mandujano does fully set forth our position regarding the position of the "putative defendant" before the grand jury.

CONCLUSION

It is therefore respectfully submitted that the judgments of conviction should be affirmed.

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OCTOBER 1975

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Brief for Appellee has been mailed to counsel for Appellant listed below:

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